

12-18-2012

U.S. Supreme Court Justices and Press Access

RonNell Andersen Jones

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Courts Commons](#), [Journalism Studies Commons](#), and the [Mass Communication Commons](#)

Recommended Citation

RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791.

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

U.S. Supreme Court Justices and Press Access

RonNell Andersen Jones *

I. INTRODUCTION

Scholars and commentators have long noted the strained relationship between the United States Supreme Court and the media that wishes to report upon its work.¹ The press corps complains that the Court is cloistered, elitist, and unbending in its traditions of isolation from the public.² Critics regularly assert that, especially when cases of major significance to many Americans are being argued,³ the Court

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. The author thanks student researchers Brooke Nelson Edwards, Joe Orien, and Brody Wight for their assistance.

1. Linda Greenhouse, *Thinking About the Supreme Court After Bush v. Gore*, 35 IND. L. REV. 435, 440 (2002) (calling the relationship “problematic at best”); Linda Greenhouse, *Telling the Court’s Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1559 (1996) (describing the Court as “quite blithely oblivious to the needs of those who convey its work to the outside world”); Paul W. Jamieson, *Lost in Translation: Civic Journalism’s Applicability to Newspaper Coverage of the U.S. Supreme Court*, 20 COMM. & L. 1, 9 (1998) (suggesting that journalists “are barely tolerated acquaintances of the Court”). Even the Justices themselves have commented on the strained relationship with the press. See Hon. Stephen Breyer, *Communication Media and Its Relationship with Supreme Courts*, 42 ST. LOUIS U. L.J. 1083, 1085 (1998) (noting “significant institutional differences that inevitably create friction”).

2. See Everette E. Dennis, *Another Look at Press Coverage of the Supreme Court*, 20 VILL. L. REV. 765, 768 (1985) (comparing press coverage of the Supreme Court to a scenario in which the media would have to cover the World Series of baseball without seeing the games); *Journalists on the Workings of the Supreme Court* (C-SPAN television broadcast Oct. 3, 2009), available at <http://supremecourtwww.c-spanvideo.org/program/289293-1> (arguing that the mystery surrounding the Court is the result of the Justices’ “unbending appeal to tradition”); Adam Liptak, *Supreme Court TV? Nice Idea, but Still Not Likely*, N.Y. TIMES, Nov. 29, 2011, at A18 (arguing that the Court’s media policies “are mostly rooted in paternalism or self-interest”); Tony Mauro, *Let the Cameras Roll: Cameras in the Courtroom and the Myth of Supreme Court Exceptionalism*, 341 REYNOLDS CT. & MEDIA L.J. 259, 259 (2011), (arguing that the Court’s “defiant stance is born of fear of change, nostalgia, a self-interested desire for anonymity, but most of all exceptionalism”).

3. See Mauro, *supra* note 2, at 266 (noting that the Court denied a C-SPAN request to televise the oral arguments for *Bush v. Gore*); Tony Mauro, *Supreme Court Asked to Allow Cameras for Health Care Arguments*, LAW TECH. NEWS, Nov. 18, 2011 at 2, available at LEXIS 1202532834915 (“There is a long history of unsuccessful media requests to the Supreme Court for television coverage of high-profile cases.”). When the case challenging the constitutionality of the Affordable Care Act arrived at the Supreme Court, the media made a strong push to persuade the Court to put cameras in the courtroom for the oral arguments. *Access to the Court: Televising the Supreme Court: Testimony before the S. Judiciary Comm. Subcomm. on Admin. Oversight and the Courts*, 112th Cong. (2011) (statement of Tom Goldstein, Partner, Goldstein & Russell, PC) (“200

unnecessarily hampers media coverage and fails to take appropriate steps to make itself an accessible, understandable institution of government, thus widening the gap between public perception and reality within the justice system.⁴

In truth, however, in at least one notable way, the U.S. Supreme Court has shown itself to be quite deeply committed to media access and resolute in acknowledging the virtues of press reportage: In deciding cases brought before it involving media coverage of *other* institutions, the Court has taken a remarkably strong stance in favor of openness and in praise of the journalistic endeavor. Indeed, it is only when making its own internal policy determinations about the propriety of press access, rather than legal proclamations about the overarching value of that access in a democracy, that the Court appears to reverse course and take a less media-friendly position.

This Article examines this apparent disconnect. It aims both to illustrate the seeming inconsistency and to initiate a dialogue about its possible causes and potential effects. The Article outlines the ways in which, generally speaking, the U.S. Supreme Court Justices, in their role as articulators of legal doctrine in judicial opinions, have been largely press-positive and access-supportive, and contrasts this with the ways in which these same Justices, in their role as establishers of their own institutional media policies and in their positions as individual

seats cannot accommodate the 100 million Americans who may be interested in those proceedings”); Liptak, *supra* note 2 (noting that the head of C-SPAN wrote to the Chief Justice the day after the case was accepted, seeking permission to broadcast oral argument); *Americans Favor Televising Supreme Court Healthcare Law Case*, GALLUP POLL NEWS SERVICE, Dec. 9, 2011, at 1 (reporting that seventy-two percent of Americans believed oral arguments should have been televised in the case).

4. Rachel Luberd, *The Fourth Branch of the Government: Evaluating the Media's Role in Overseeing the Independent Judiciary*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 507, 519 (2008) (arguing the Court “create[s] a barrier that often inhibits media scrutiny” and that this “makes room for misinterpretation of the Court’s legal reasoning and for opportunities for subjectivity in reporting”). Polls and studies have consistently shown that the public’s perception of the Court is far removed from reality. *See, e.g.*, ROBERT J. MCKEEVER, *THE UNITED STATES SUPREME COURT: A POLITICAL AND LEGAL ANALYSIS* 111 (1997) (“Public knowledge of the Court’s decisions is also low: about three-fifths of Americans cannot describe any Court ruling they like or dislike or accurately describe even the Court’s great landmark decisions.”); THE PEW RESEARCH CTR., *POLITICAL KNOWLEDGE UPDATE, WELL KNOWN: TWITTER; LITTLE KNOWN: JOHN ROBERTS*, 32 (2010) (showing that only twenty-eight percent of respondents could identify John Roberts as the Chief Justice); *Fewer than a third of Americans know Supreme Court rulings are final*, ANNENBERG PUB. POL'Y CTR. (Sept. 13, 2007), <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=235> (reporting that only thirty percent of Americans know that U.S. Supreme Court rulings are final).

representatives of a public institution, are largely press-negative and access-wary. Because this dichotomy may have ramifications for both public education and the flow of information in our constitutional democracy, the Article then begins a conversation about possible rationales for the variance in the Court's attitudes toward and treatment of the media. It suggests that although the Court's concerns about institutional legitimacy and detachment from political pressures are admirable, they may not warrant as significant a gulf as currently exists between the Court's case-law position on the press and its internal-policy position on the press.

Part II describes the substantial corpus of case law, particularly in the last fifty years, that suggests a Supreme Court view of the press as a positive, public-serving entity to be both accommodated and celebrated. It demonstrates the ways in which the Court has promoted media access as a critically important component of American democracy.

Part III outlines the most common criticisms leveled against the Supreme Court on the question of press access, focusing on the suggestion that the Justices create major barriers to the institution and its public-serving work. It illustrates the patterns of the Justices *institutionally* declining to accommodate the needs of reporters, as the Court sets policy for media coverage of oral argument and other aspects of its operations. It also discusses ways in which the Justices *individually* have declined to do so, as journalists have sought to report upon a Justice's public appearances or actions.

Part IV investigates possible explanations for the seeming contradiction and conducts an initial analysis of the strength of these justifications. Part V concludes with a recommendation that the Court seek to more closely align its internal policies on issues of media access with the thoughtful commentary in its own case law about the overarching virtues of the press in our society.

II.

In the last fifty years, the United States Supreme Court has issued numerous landmark decisions focused on the role of the press in democratic society. It has praised the media for its watchdog role,⁵ extolled the virtues of a free press,⁶ called for public transparency and

5. See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

6. See *Estes v. Texas*, 381 U.S. 532, 539 (1965) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and

accountability,⁷ and highlighted the ways in which a vigorous press and unfettered reporting facilitate these important values.⁸ Indeed, although the trend certainly is not uniform,⁹ and some have recently suggested a waning trajectory,¹⁰ on the whole, the Court's jurisprudence has been exceptionally press-friendly from the Warren Court to the present. The last half century is an era that has given us such watershed media cases as *New York Times Co. v. Sullivan*,¹¹ *Bartnicki v. Vopper*,¹² *Cox Broadcasting Corp. v. Cohn*,¹³ *Hustler Magazine, Inc. v. Falwell*,¹⁴

employees and generally informing the citizenry of public events and occurrences, including court proceedings.”).

7. See *Smith v. Doe*, 538 U.S. 84, 99 (2003) (noting that especially in the criminal justice system, “[t]ransparency is essential to maintaining public respect”).

8. See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) (“[F]ree and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.”).

9. See *Branzburg v. Hayes*, 408 U.S. 665, 667, 708–09 (1972) (rejecting a First Amendment privilege for reporters to refuse to testify before a grand jury regarding confidential sources); *Estes*, 381 U.S. 532 at 534–35 (holding that permitting a television broadcast of a sensational Texas criminal trial deprived the defendant of his due process); see also *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 905 (2010) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)) (suggesting that the Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers”).

10. See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 506 (2002) (“It is not at all clear that the press as an institution specially protected by law will survive. In the opinions of the Supreme Court, ‘freedom of the press’ peaked nearly half a century ago.”); Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 FED. COMM. L.J. 579, 582–84 (2011) (arguing that the Roberts Court First Amendment jurisprudence will result in further restrictions on speech and the press); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1080 (2009) (arguing that some revealing cases “could signal a turn at the Supreme Court in favor of personal privacy and against press freedoms”).

11. 376 U.S. 254, 256, 269–273 (1964) (holding that the freedom of speech in the First and Fourteenth Amendments, along with “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” offers a high level of protection to the press in a libel suit brought by a public official).

12. 532 U.S. 514, 517–18, 534 (2001) (holding that the press cannot be punished when it publishes information of public importance it legally obtains from a third party who came into possession of the information illegally, because “privacy concerns give way when balanced against the interest in publishing matters of public importance”).

13. 420 U.S. 469, 471, 496–97 (1975) (holding that a state cannot punish the press when it publishes a rape victim’s name when that information was obtained from public records).

14. 485 U.S. 46, 56 (1988) (holding that in order to protect the free flow of ideas and opinions on matters of public interest and concern, “public figures and public officials may not recover for the tort of intentional infliction of emotional distress” in the absence of actual malice).

Richmond Newspapers, Inc. v. Virginia,¹⁵ and the *Press-Enterprise* cases,¹⁶ all insisting upon government openness and media access and freedom. This is a Court that, at least when its judicial robes are on, quite regularly sides with press-freedom values, even when those values are at odds with other values society ordinarily wishes to see protected quite vigorously, like the rights of criminal defendants,¹⁷ reputational rights,¹⁸ and rights of privacy.¹⁹

The Court's press friendliness extends beyond its actual holdings to the general tone that it has used in referencing the press. Time and again—in cases all across the media law spectrum—the Supreme Court has offered up various forms of a media-praising speech that casts journalists in a heroic role of civic virtue. Repeatedly, the Court has highlighted the way in which the press plays a role as a check on government,²⁰ the essential function it serves in our democracy,²¹ and

15. 448 U.S. 555, 558, 581 (1980) (holding that, absent an extraordinary showing, criminal trials must be open to the public and press).

16. *Press-Enter. Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501, 503, 508 (1984) (holding that voir dire examinations are presumptively open to the public and the press); *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty. (Press Enterprise II)*, 478 U.S. 1, 3, 12, 15 (1986) (extending the reasoning of *Press Enterprise I* to preliminary hearings).

17. See *Richmond Newspapers*, 448 U.S. at 580–81 (holding that the public “right to attend criminal trials is implicit in the guarantees of the First Amendment” and that defendants, therefore, cannot exclude the public from a criminal trial without producing evidence of unfairness) (citation omitted).

18. See *Hustler*, 485 U.S. at 53 (articulating, in response to a tort victim's claim of intentional emotional distress, that although “a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942)) (explaining that the public interest in free speech “outweighs” competing interests in public-official libel claims).

19. *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (“[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance.”); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) (recognizing that “interests in privacy fade when the information involved already appears on the public record [and] . . . when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press”).

20. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.”).

21. *Herbert v. Lando*, 441 U.S. 153, 184–85 (1979) (noting, in a case involving a television investigative news program, that “[i]n its instrumental aspect, the First Amendment serves to foster the values of democratic self-government” by “shield[ing] those who would censure the state or expose its abuses.”); *N.Y. Times*, 403 U.S. at 717 (Black, J., concurring) (“[T]he Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.”); Craig

the critical part it plays in the discussion of public affairs.²² We are told by the Justices that the press serves as a “powerful antidote to any abuses of power” and is a “constitutionally chosen means for keeping [government] responsible”²³ to those it serves and keeping the public informed of important democratic developments.

In *Richmond Newspapers v. Virginia*, for example, the Court praised the media’s critical role as surrogate, cited its importance to public understanding of the law and criminal justice, and speculated that this justified priority entry and special seating for the valuable institution of the press.²⁴ In *Time, Inc. v. Hill*, the Court declared that American society “places a primary value on freedom of speech and of press.”²⁵ In *Cox Broadcasting v. Cohn*,²⁶ the Court emphasized that without the press, citizens would be unable to vote intelligently or register thoughtful opinions:²⁷ “[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”²⁸ The Court noted the “great responsibility” of the press and suggested that the ability of the media to “report fully and accurately the proceedings of government” is central to our constitutional democracy.²⁹

In *Sheppard v. Maxwell*, the Court called the press the “handmaiden of effective judicial administration.”³⁰ It emphasized that this important role “required that the press have a free hand,” even when its editorial decisions were thought by the Court to be unwise.³¹ According to the Court, the “unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could

v. Harney, 331 U.S. 367, 383 (1947) (Murphy, J., concurring) (“A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“[A] free press is a condition of a free society.”).

22. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (noting that the freedom of a free press to comment on public affairs is “essential . . . to healthy government”); *Mills*, 384 U.S. at 219 (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.”).

23. *Mills*, 384 U.S. at 219.

24. 448 U.S. 555, 573 (1980).

25. 385 U.S. at 388.

26. 420 U.S. 469 (1975).

27. *Id.* at 492.

28. *Id.* at 491.

29. *Id.* at 491–92.

30. 384 U.S. 333, 350 (1966).

31. *Id.*

be countenanced in an orderly society.”³² Importantly, the Court in *Sheppard* acknowledged—as it has since repeated elsewhere—that the workings of the judiciary are matters of public concern³³ and that press coverage of this branch is likewise invaluable.³⁴

And in *New York Times v. Sullivan*, the Court reached its watershed holding by way of a formidable exposition of the power, promise, and purpose of the press in a free society. Quoting Madison, the opinion asserted that in every state in the Union “the press has exerted a freedom in canvassing the merits and measures of public men, of every description On this footing the freedom of the press has stood; on this foundation it yet stands.”³⁵

III.

And yet, in their own dealings with the press—when *they* are the “public men of every description”—the Court and its Justices have often been accused of being significantly more circumspect, and sometimes overtly hostile, creating major barriers to press access to the institution and its work, and declining to accommodate the needs of reporters who endeavor to cover the activities of the judicial branch and its most prominent actors.

Indeed, the Court has regularly been faulted for being isolated, secluded, and withdrawn. These criticisms have been lobbed at the Court both (1) *institutionally*, for its official policies on media access to its oral arguments and on the release of its opinions to the press, and, (2) with few exceptions, *individually*, for the Justices’ unwillingness to allow or accommodate coverage of their out-of-Court activities or of speeches at public events in which they participate. Each will be addressed in turn.

A. Critiques of the Court as an Institution

Institutionally, as one commentator summarized, the press is “accepted but not courted.”³⁶ There is substantial evidence that reporters

32. *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 265 (1941)) (alteration in original).

33. *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 839 (“The operations of the courts and the judicial conduct of judges are matters of utmost public concern.”).

34. *Id.* at 839 (quoting *Bridges v. California*, 314 U.S. at 289 (Frankfurter, J., dissenting)) (noting that “the law gives ‘[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions’”) (alteration in original).

35. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (emphasis added).

36. DAVID L. GREY, *THE SUPREME COURT AND THE NEWS MEDIA* 47 (1968).

are viewed as unavoidable fixtures to be endured, but that they are not warmly welcomed, and certainly not enthusiastically assisted.

At least some press policies at the Supreme Court arguably show a total indifference to the needs of the media—with useful information rarely provided, and when it is provided, coming long after it would be useful to those turning around news on a modern deadline. Video coverage is flatly denied.³⁷ Even when the Court finally decided to provide audio recordings, the decision was slow in coming, and its initial policy of hand-picking only certain presumably important cases for the public to hear underscored its reticence and had the unfortunate effect of reemphasizing that all of the rest of the cases were off limits.³⁸ The Justices ultimately landed on a policy that releases the audio at the end of the workweek, when the news cycle has long since passed.³⁹ Indeed, when the highest Courts of other nations in the world were well into their experiences with video coverage and moving on to examining other modern technology,⁴⁰ the U.S. Supreme Court Justices were debating

37. *Visitor Etiquette*, SUP. CT. U.S., <http://www.supremecourt.gov/visiting/visitorservices.aspx> (last visited Mar. 15, 2012) (“No photography or video recording is permitted inside the Courtroom.”); see, e.g., Kenneth W. Starr, *Open Up High Court to Cameras*, N.Y. TIMES, Oct. 3, 2011, at A25; *On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body’*, N.Y. TIMES, Mar. 30, 1996, at A24 (quoting Justice Souter: “I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.”).

38. While the Supreme Court has recorded oral arguments since 1955, use of the audio was initially limited to the justices and their clerks, with some access granted to researchers. *Recordings of the Court*, OYEZ.ORG, <http://oyez.org/about> (last visited Mar. 15, 2012). The Court did not grant public access to these archived recordings until the early 1990s. *Id.* Even then, release of the recordings was delayed until the following term. See Editorial, *Your Court in Action*, N.Y. TIMES, Oct. 21, 2010, at A38. Finally, starting with *Bush v. Gore* and *Grutter v. Bollinger*, the Court decided to release same-day audio recordings for highly publicized cases of the Court’s own choosing. Linda Greenhouse, *Justices Enter the Radio Age*, N.Y. TIMES, Apr. 6, 2003, at WK2.

39. Press Release, SUP. CT. OF THE U.S., (Sept. 28, 2010), available at http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_09-28-10.html; *Argument Audio*, SUP. CT. U.S., http://www.supremecourt.gov/oral_arguments/argument_audio.aspx (last visited Mar. 15, 2012); see also Tony Mauro, *Supreme Court Will Release Argument Audio on Delayed Basis*, BLOG LEGAL TIMES (Sept. 28, 2010, 2:30 PM), <http://legaltimes.typepad.com/blt/2010/09/supreme-court-will-release-argument-audio-on-delayed-basis.html> (explaining the new policy as “a move that virtually ensures the justices’ voices won’t turn up in news reports except in Sunday talk shows or later when the decision is released”).

40. See Beverley McLachlin, Chief Justice of Can., Remarks: The Relationship Between the Courts and the Media (Jan. 31, 2012) (transcript available at <http://www.scc-csc.gc.ca/court-court/ju/spe-dis/bm2012-01-31-eng.asp>) (“The Supreme Court of Canada has permitted television coverage of all its hearings since the mid-1990s The Supreme Court’s experience with television and webcasting has been positive.”); David K. Malcolm, *Judicial Independence and Accountability*, 48 FED. LAW. 42, 48 (2001) (“[T]elevising of some court proceedings is generally permitted in many jurisdictions, both common and civil law, across the world.”); see generally

whether to allow pens,⁴¹ and facing criticism for dragging their feet in the development of a simple plan for releasing same-day written transcripts of oral arguments.⁴²

Likewise, the Court has been criticized for its insensitivity to media realities in the way it releases to the public the Justices' opinions in decided cases. The release of decisions is often viewed as having a feast-or-famine dynamic,⁴³ with the Court providing no access at all to its work product for long stretches of time and then providing more than could possibly be digested by any journalist or any would-be informed member of the public,⁴⁴ as the Court releases decisions in numerous cases of widespread import all at once, often in the final days of the term.

In contrast to the massive public-information machines of its concomitant branches of government, which hold regular briefings and

Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791 (2004) (outlining the electronic recording and transmission policies of several jurisdictions). In May 2011, the Supreme Court of the United Kingdom launched an internet website designed to allow its proceedings to be watched in real time. *Press Notice, Supreme Court of the UK, "Justice being seen to be done" with launch of "Supreme Court TV,"* (May 16, 2011), available at http://www.supremecourt.gov.uk/docs/pr_1106.pdf.

41. See Tony Mauro, "In Other News. . .": *Developments at the Supreme Court in the 2002-2003 Term That You Won't Read About in the U.S. Reports*, 39 TULSA L. REV. 11, 15 (2003) ("[T]he Court dropped its longstanding policy against note-taking by public spectators in the Court chamber during public sessions. From roughly November of 2002 on, Court police officers no longer enforced this baffling rule.").

42. See Charles Lane, *High Court to Post Same-Day Transcripts*, WASH. POST, Sept. 15, 2006, at A08 (announcing the Court's new policy of posting same-day oral argument transcripts, "which law professors, lawyers and reporters have been urging for years"); *Transcripts and Recordings of Oral Arguments*, U.S. SUP. CT., http://www.supremecourt.gov/oral_arguments/availabilityoforalargumenttranscripts.aspx (last visited May 5, 2012).

43. See, e.g., Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059, 1073 (1998) ("For years, the Supreme Court press corps has asked the Court to spread the decisions out in a more measured way in May and June so that the news media has more days on which to digest the opinions and more newspaper space or air time to devote to the reporting.").

44. See Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, *supra* note 1, at 1558 ("The last day of the 1987-1988 Term was a journalistic nightmare that has attained the status of legend. The Court issued nine decisions that filled 446 pages in the United States Reports, including a number of important cases and one, the decision that upheld the independent counsel statute, of landmark significance."); Tony Mauro, *The Chief and Us: Chief Justice William Rehnquist, the News Media, and the Need for Dialogue Between Judges and Journalists*, 56 SYRACUSE L. REV. 407, 408 (2006); Hon. Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 LOY. U. CHI. L.J. 275, 281 (1998) ("It is not uncommon, on days in June, for the Court to release in one fell swoop six or even more opinions, consuming over 100 pages in the small print of U.S. Law Week.").

schedule interviews with Senators, Representatives, the President, and legislative and executive staff, the Supreme Court has a very small Public Information Office with duties that are almost totally "ministerial."⁴⁵ The office has "neither the authority nor the inclination to comment substantively" on any matters before the Court or any decision handed down by it.⁴⁶ The Public Information Office instead is essentially a document delivery entity, distributing the lists of cases the Court has decided to hear, its calendar of oral arguments, the briefs that parties have submitted, and ultimately, the full opinions of the Justices in each decided case with no official summary or other assistance in processing their content.⁴⁷ The Justices themselves do not routinely grant interviews, so reporters who cover the Supreme Court work without the benefit of what is otherwise the most "obvious journalistic technique"⁴⁸ and "live in professional isolation from their subjects, glean[ing] information vicariously through legal documents."⁴⁹

Critics have asserted that the challenge of reporting on the Court is heightened as the opinions of the Court become longer and more complicated,⁵⁰ and thus increasingly difficult to digest on a deadline.⁵¹

45. Jamieson, *supra* note 1, at 8; Ginsburg, *supra* note 44, at 276 ("Since 1973, the U.S. Supreme Court has had a full-time Public Information Officer, today aided by a staff of four.").

46. Jamieson, *supra* note 1, at 8; *see also* Wermiel, *supra* note 43, at 1071 (noting that the Public Information Officer "does not as a general rule explain the Court's actions or comment on the decisions").

47. The opinions are issued with a "syllabus" summarizing the facts and holding of the case, but the Court stresses that the syllabus is not authoritative. In most opinions, the Court states before the syllabus: "The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader," citing *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906).

48. Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, *supra* note 1, at 1543.

49. Jamieson, *supra* note 1, at 9; *see also* Mauro, *supra* note 44, at 411 ("I, for one, have probably had no more than twenty-five conversations with Justices in twenty-five years of covering the Court, and only one on the record."). The major exception to this dynamic appears to be when a Justice has a book to promote. Editorial, *The Supreme Court Club*, N.Y. TIMES, Jan. 16, 2008, at A22 (indicating that the Justices increasingly grant interviews under these circumstances).

50. *See* Chemerinsky, *supra* note 10, at 579–80 (indicating that the length of opinions has consistently increased every year, and discussing the difficulty of summarizing opinions that exceed 200 pages); *see also* Greenhouse, *Thinking About the Supreme Court After Bush v. Gore*, *supra* note 1, at 439 ("[A]n educated person ought to be able to pick up a Supreme Court opinion, make sense of the reasoning, find a clear bottom line, and count the vote, without making a two-color chart.").

51. *See* Luberd, *supra* note 4, at 524 ("[T]he Court may also assist the media by making its opinions more accessible. This can be achieved by crafting what would otherwise be complicated legal reasoning in a more 'readily obtainable' and 'understandable' fashion.").

Landmark cases like *Bush v. Gore*⁵² have revealed some of the obstacles that reporters face as they attempt to report the holdings of cases as quickly and efficiently as possible. These concerns were renewed and amplified recently as the Court released its opinions in the cases challenging the Affordable Care Act. Despite requests from the press and the parties, the Court opted not to email the opinion to the parties, including the government, at the time of the announcement.⁵³ Instead, the Court relied on its website for distribution of the opinions, which were to be posted just after the beginning of their announcement from the bench.⁵⁴ At the time of the announcement, however, the Court's "website [was] the subject of perhaps greater demand than any other site on the Internet – ever," and so the site crashed, leaving the only copies of the opinion with those reporters in the Supreme Court pressroom who had hard copies.⁵⁵ Even the White House was left in the dark.⁵⁶

In a desperate attempt to report on the case first, two major cable news networks announced the holding incorrectly.⁵⁷ For more than five minutes, before the networks finally corrected themselves, both stations' banners misleadingly read that the act was invalidated.⁵⁸ It has been

52. Reporters have described the chaotic circumstances they faced while trying to report the court decision that would determine the presidential election. Greenhouse, *Thinking About the Supreme Court After Bush v. Gore*, *supra* note 1, at 435 ("We received no guidance from the Court staff as to when a decision might come. The breathless waiting, interrupted only by calls from increasingly worried editors as deadlines approached, took on a vaguely hallucinogenic quality."); Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore*, 35 AKRON L. REV. 185, 185 (2002) ("Network 'runners' . . . grabbed copies, dashed outside, and handed them to on-air reporters who were waiting in the darkness on the Supreme Court plaza The reporters then ludicrously attempted to understand, synthesize, and explain 65 pages of judicial exposition instantaneously. The reporters stumbled badly, and everyone remained in the dark, in every sense.").

53. Tom Goldstein, *We're Getting Wildly Different Assessments*, SCOTUSBLOG, (July 7, 2012), <http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/>.

54. *Id.*

55. *Id.*

56. *Id.*

57. Katherine Fung and Jack Mirkinson, *Supreme Court Health Care Ruling: CNN, Fox News Wrong on Individual Mandate*, HUFFINGTON POST, (June 28, 2012, 3:52 PM), http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate_n_1633950.html. The stations had not read further into the opinion to discover that the mandate was upheld as a tax after being rejected as unconstitutional under the Commerce Clause. Goldstein, *supra* note 53.

58. Goldstein, *supra* note 53; Fung & Mirkinson, *supra* note 57. Once the CNN reporter realized the mistake, she apologized, calling the opinion "very confusing [and] large." *Id.* See Orangecountyfdems, *Complete Train Wreck: CNN Health Care Ruling Fail, Full Video*, YOUTUBE, (June 28, 2012), <http://www.youtube.com/watch?v=LsjHThZmKrw> (originally broadcast live on CNN) for the broadcast of the erroneous results and the eventual correction on CNN.

suggested that those minutes of error resulted in the loss of millions of dollars in the stock market⁵⁹ and confusion for scores of Americans, including President Obama⁶⁰ and members of Congress.⁶¹

All told, then, press advocates pose some fairly significant institutional criticisms regarding the Court's refusal to adjust the way it does business. Indeed, these advocates assert, even seemingly minor institutional adjustments would have positive benefits for the flow of information about the Court from the press to the public and would at least arguably be more in keeping with the Court's own statements about the virtues of press access.

B. Critiques of the Individual Justices

Individually, this contrast is arguably just as stark. There are numerous historical and current examples of Justices,⁶² including those who authored or joined strongly press-supportive Court opinions, demonstrating resistance to the media or flatly prohibiting press coverage of their own public engagements or potentially relevant aspects of their lives off the bench. A few stark examples serve to prove this point.

From the bench, Justice Harry Blackmun joined the press-praising Supreme Court majorities in *Nebraska Press Association v. Stuart*,⁶³ *Miami Herald Publishing Co. v. Tornillo*,⁶⁴ *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*,⁶⁵ and *Florida Star v. B.J.F.*⁶⁶ in the 1970s and 1980s. He famously dissented in *Cohen v. Cowles Media Co.* to assert that the press should even have a First Amendment right to

59. Goldstein, *supra* note 53 (“[M]any millions of dollars were gained and lost in the markets based on which media reports traders and investors happened to be watching.”).

60. *Id.* (“At the White House, there is more to the story than the spin that the President believed the Administration had lost the case only for a very short period of time. In fact, for at least a few minutes he thought the opposite and for more than five minutes, he had substantially worse information than many Americans.”).

61. See Mark Hanrahan, *Jean Schmidt Reacts to Incorrect Report of Health Care Ruling, Screams ‘Yes! Yes!’*, HUFFINGTON POST, (June 29, 2012, 11:16 PM), http://www.huffingtonpost.com/2012/06/29/jean-schmidt-reacts-health-care-ruling_n_1638335.html (showing the extreme reaction of Rep. Jean Schmidt of Ohio as she was erroneously informed that the Affordable Care Act was struck down).

62. For an excellent comprehensive analysis of modern Justices and their relationships with the media, and additional details on the illustrations mentioned here, see generally RICHARD DAVIS, JUSTICES AND JOURNALISTS (2011).

63. 427 U.S. 539 (1976).

64. 418 U.S. 241 (1974).

65. 460 U.S. 575 (1983).

66. 491 U.S. 524 (1989).

break their promises to sources.⁶⁷ But Blackmun was anything but a champion of press freedom in his actual dealings with the media. He routinely declined to release text of his public speeches,⁶⁸ testily rebuffed press inquiries about his health when treated for prostate cancer,⁶⁹ and flatly refused to respond to reporter inquiries about resigning his longtime membership in an all-male club on the eve of the Court's hearing a constitutional challenge to such clubs.⁷⁰

From the bench, Chief Justice Warren Burger issued such powerful, press-praising opinions as *Richmond Newspapers, Inc. v. Virginia*,⁷¹ *Nebraska Press Association v. Stuart*,⁷² and *Tornillo*.⁷³ In authoring these for the Court, he spoke repeatedly of the "crucial process" of media coverage,⁷⁴ and the need to protect the "vital constitutional guarantee" of a free press.⁷⁵ But as Chief Justice, his efforts to open the Court to real and meaningful press coverage consisted of little more than agreeing to have the "press officer hand out opinions in the pressroom rather than blasting them down from the bench through pneumatic tubes."⁷⁶ In thirty years on the bench, he consistently declined to submit to news conferences, except in his role as chairman of the Commission on the Bicentennial of the U.S. Constitution.⁷⁷ He "stoutly opposed all photographic or broadcast coverage of the . . . Court," and even "refused to allow television coverage of his otherwise public speeches, such as his annual report to the American Bar Association."⁷⁸ "He once knocked a television camera out of the hand of a network cameraman who followed him into an elevator," and is reported to have flown into a rage when CBS radio and television broadcast portions of the Pentagon Papers case

67. 501 U.S. 663, 675–76 (1991) (Blackmun, J., dissenting) ("[T]he law may not be enforced to punish the expression of truthful information or opinion.").

68. Stuart Taylor Jr., *Washington Talk: The Supreme Court; Lifting of Secrecy Reveals Earthy Side of Justices*, N.Y. TIMES, Feb. 22, 1988, at A16.

69. Philip M. Boffey, *Health of Justices Poses Little Threat to the High Court*, N.Y. TIMES, (Sept. 20, 1987), at A48.

70. Taylor, *supra* note 68, at A16.

71. 448 U.S. 555 (1980).

72. 427 U.S. 539 (1976).

73. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

74. *Id.* at 258.

75. *Neb. Press*, 427 U.S. at 570.

76. JOE MATHEWSON, *THE SUPREME COURT AND THE PRESS: THE INDISPENSABLE CONFLICT* 363 (2011).

77. Wayne King & Warren Weaver Jr., *Briefing: Burger and the Press*, N.Y. TIMES, Apr. 14, 1986, at A16.

78. *Id.*

ten years after the fact using footage kept at the National Archives.⁷⁹ Burger demanded that the archives receive no further recordings.⁸⁰

Justice David Souter absolutely championed the freedom of the press in his bold dissent in *Cohen v. Cowles*.⁸¹ He argued that “freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed.”⁸² The First Amendment, he said, “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”⁸³ It is of paramount importance, Souter argued, that we be able to “register opinions on the administration of government generally.”⁸⁴ Yet in his own role as a governmental official, Justice Souter’s reclusiveness was extreme. When he joined the Court in 1990, he met the press corps in a traditional greeting event and stayed only an hour before inching to the door. He reportedly called out, “Let’s do it again when I retire,” and then never spoke a word to the press again, *including* when he retired, abandoning the norm of a departing press event.⁸⁵ He told a congressional committee that the day a camera came into the Supreme Court it would be “over [his] dead body.”⁸⁶

Chief Justice William Rehnquist, despite his generally conservative ideology and his frequent role as a dissenter in cases involving the expansion of individual liberties, nevertheless found himself joining his liberal colleagues when it came to core issues of media rights, including prior restraints, gag orders, and other issues of content control and access.⁸⁷ But as Chief Justice, it appears he was wholly uninterested in

79. Linda Greenhouse, *Nixon Appointee Eased Supreme Court Away From Liberal Era: Warren E. Burger, Who Led Supreme Court for 17 Years, Dies at 87*, N.Y. TIMES, June 26, 1995, at B6; MATHEWSON, *supra* note 76, at 364.

80. *Id.*

81. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 676 (1991) (Souter, J., dissenting).

82. *Id.* at 678.

83. *Id.* (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

84. *Id.* (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)).

85. Tony Mauro, *How To Open Up Our Court: Justice Scalia Will Make A Rare TV Appearance – But Only to Peddle His Book. The Supreme Court Needs to Find More Innovative Ways to Lift Its Cloak of Secrecy*, USA TODAY, Apr. 23, 2008, at 1; Tony Mauro, *No Retirement Press Conference for Justice Souter*, THE NAT’L L.J. (May 5, 2009), <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202430428707>.

86. *On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body’*, N.Y. TIMES, Mar. 30, 1996, at 24 (internal quotation marks omitted).

87. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47, 57 (1988); *Press-Enter. Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501, 502, 504–05 (1984); *Herbert v. Lando*, 441 U.S.

improving access to his own institution or in facilitating coverage of Court proceedings. He reportedly once told a social gathering of Court reporters, “the difference between us and the other branches of government is that we don’t need you people of the press.”⁸⁸

No less than William Brennan, the author of both *New York Times v. Sullivan* and *Time Inc. v. Hill*, was, for most of his career, deeply critical of the press and adamantly opposed to working with or accommodating them in even minor ways.⁸⁹ The same Justice who, in his capacity as jurist, extolled the virtues of the press in ensuring that dialogue on public matters is “uninhibited, robust, and wide-open,”⁹⁰ himself declined almost all interview requests,⁹¹ once shoved an Associated Press reporter,⁹² called Washington Post reporter Bob Woodward a “skunk,”⁹³ and replaced his usually gregarious personality with a sharp and scolding one whenever the media was involved.⁹⁴ He told a crowd at Rutgers University that the media consistently misapprehends the issues at stake and fails in its task of illuminating issues for the public because “self-righteousness” and “bitterness” can “cloud[] its vision.”⁹⁵

Indeed, even among the currently sitting Justices, a majority have made statements arguably inconsistent with the press-praising media law jurisprudence of our day, strongly suggesting they believe reporters to be largely incompetent and dis-serving to, rather than critical components of, public information about our democracy.⁹⁶

153, 155, 176–77 (1979); *Landmark Commc’n, Inc. v. Virginia*, 435 U.S. 829, 830, 845–46 (1978); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 540, 570 (1976); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 242, 258 (1974); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974).

88. MATHEWSON, *supra* note 76, at 8.

89. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 461 (2010).

90. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

91. STERN & WERMIEL, *supra* note 89, at 461.

92. *Id.*

93. *Id.* at 463.

94. *Id.* at 461–62.

95. *Id.* at 462–63.

96. Soon after he joined the Court, Justice Samuel Alito said in a speech that the “news media typically oversimplifies and sensationalizes.” John Heilprin, *Scalia Sees Shift in Court’s Role*, WASH. POST, Oct. 23, 2006, at A19. He bemoaned the existence of the Internet because the spreading of misinformation by the press more broadly takes a toll on the judiciary. *Id.* In a separate address, he said that most of what people read and hear about the Supreme Court is misleading or just plain wrong. William H. Freivogel, *Alito Talks Media With Lawyers in St. Louis*, GATEWAY JOURNALISM REVIEW (May 23, 2011), <http://gatewayjr.org/2011/05/23/alito-talks-media-with-lawyers-in-st-louis/>. Justice Ruth Bader Ginsburg quoted Felix Frankfurter in urging the press to cover the Court “as least as well as it covers the World Series.” Frank J. Murray, *Ginsburg Finds Full Court Press Lacking in Clarity*, WASH. TIMES, Feb. 13, 1995, at A3. Ginsburg has publicly

As a descriptive matter, then, there is an at least apparent divide between what the Justices as Justices *say* about the role of the press in our society and the virtues of press access and what the Justices as individual or institutional decision-makers *do* when making their own choices about press access.

IV.

As an explanatory matter, however, the question is significantly more complicated. The seemingly conflicting stances taken by the Justices in their personal and institutional determinations on press access are likely the product of one or more potential explanations rooted in the perceived uniqueness of the Court. Plainly, the Justices genuinely believe themselves to be somehow different, and believe the question of press access to them and their work to be somehow different than the contexts to which they are speaking in their press-praising, access-supporting judicial opinions. A combination of structural, constitutional, and practical justifications provide possible explanations for the press-access divide and should form the basis of a larger discussion on the question.

argued that the press is not a good translator and that it over-interprets unimportant actions, inappropriately forecasts outcomes, and overstates the significance of certiorari denials. *Id.* Its work, she has said, is “more eye-catching than significant.” *Id.* Justice Anthony Kennedy, despite waxing more eloquent than any other sitting Justice on First Amendment freedoms, has taken perhaps the strongest stance against cameras at the Supreme Court of any sitting Justice and recently gave a speech in which he criticized both daily news reporters and editorial writers. Charles Lane, *Kennedy’s Assault on Editorial Writers*, WASH. POST, Apr. 3, 2006, at A17. Justice Clarence Thomas has publicly referred to members of the media as “smart-aleck commentators,” “snot-nosed brats,” “talking heads who shout at each other,” and “snotty-nosed smirks.” “*Snotty-nosed Cynics Blasted in a Speech by Justice Thomas*, THE FRESNO BEE, Sept. 15, 2008, at A9. Thomas repeatedly asks that his speeches be closed to the media because he “just wants it to be among friends.” RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE SUPREME COURT AND THE MEDIA* 185 (2011). Most colorfully, Justice Antonin Scalia said in a recent speech, “The press is *never* going to report judicial opinions accurately . . . They’re just going to report, who is the plaintiff? Was that a nice little old lady? And who is the defendant? Was this, you know, some scuzzy guy? And who won? Was it the good guy that won or the bad guy?” Heilprin, *supra*, at A19 (emphasis added). Justice Scalia has also expressed a surety that the broadcast media could not be trusted to accurately convey the goings-on of the Court if cameras were permitted in the courtroom. See Tal Kopan, *Scalia: Cameras in Supreme Court Would ‘Mis-educate’ Americans*, POLITICO (July 26, 2012, 5:37 PM), <http://www.politico.com/blogs/under-the-radar/2012/07/scalia-cameras-in-supreme-court-would-miseducate-americans-130246.html>. Scalia has insisted that “[t]he First Amendment has nothing to do with whether we have to televise our proceedings.” *Id.*

A. *The Countermajoritarian Difference?*

One possibility is that the Justices are constitutionally different—that the rights-promoting, access-encouraging language of these media law opinions is speaking to the politically accountable elected branches, while the Court remains the so-called “least dangerous branch” that is structurally permitted—indeed, mandated—to be countermajoritarian.⁹⁷ Under this explanation, all of the language from the Supreme Court speaking to the need for press access as a vehicle to democratic dialogue and emphasizing the need to ensure that debate on public issues is “uninhibited, robust and wide-open”⁹⁸ applies only to the political branches of government, whose work product is designed to be tempered by the electorate. Conversely, when we speak of the judiciary, whose sole power is its own legitimacy⁹⁹ and whose tasks are the delicate ones

97. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) (noting that judicial review promulgates undemocratic outcomes by allowing unelected judges to “thwart” legislative enactments and to “exercise[] control, not in behalf of the prevailing majority, but against it.”); *THE FEDERALIST* NO. 78, at 393, 397 (Alexander Hamilton) (Bantam Classic ed. 1982) (an independent judiciary with life tenure is necessary “to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves “and is an “excellent barrier to the encroachments and oppressions of the representative body.”); see also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 344 (1998) (“[T]he Framers appear to have constructed the judiciary in deliberately countermajoritarian fashion.”).

98. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

99. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion) (“The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”); see *THE FEDERALIST* NO. 78 *supra* note 97, at 393–94 (describing the judiciary as the “least dangerous” branch because it “has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”).

of judicial review and protection of minority interests,¹⁰⁰ the media-access calculus would come out differently.¹⁰¹

Plainly, the value of judicial independence is substantial. Any encroachment on the ability of the judiciary to act in its role of applying the Constitution's commands without regard to public preference is to be assiduously avoided.¹⁰² The reality or perception of the U.S. Supreme Court as a governmental institution that should align itself with the current will of the populace or react to majority pressures is harmful to the very essence of our system of separation of powers.¹⁰³ But it is not

100. See *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); see also *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("[A]ny suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment."); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."); LAURENCE H. TRIBE, *THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS: LIMITS ON GOVERNMENT AUTHORITY* 896 (1978) (noting that courts "must ultimately define and defend rights against government in terms independent of consensus or majority will"); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1 (1996) ("It is common wisdom that a fundamental purpose of judicial review is to protect minority rights from majoritarian overreaching.").

101. This difference has perhaps been invoked most vigorously in the context of the debate over cameras at the Court. Justice Anthony Kennedy has remarked that "[w]e teach, by having no cameras, that we are different." *Cameras in the Court*, C-SPAN, <http://www.c-span.org/The-Courts/Cameras-in-The-Court/> (last visited May, 14, 2012). Justice Antonin Scalia has stated that "[o]ne of the traditions of the American judiciary . . . is not to thrust itself before the public . . . I think some of the Justices would feel that value, among others, would be somewhat compromised by televising all of the proceedings." *Id.* Cf. Bruce G. Peabody, "Supreme Court TV": *Televising the Least Accountable Branch?*, 33 J. LEGIS. 144, 155 (2007) ("[O]bjecting to greater public exposure to the Court through televised proceedings seems to be anti-democratic . . .").

102. Breyer, *supra* note 1, at 1088 ("We are all fully conscious of the need for fair and independent judicial processes, as an essential guarantee for many other basic human liberties. We are also fully conscious of the need for free speech and free press, which are also necessary guarantees in a democratic government. Sometimes these necessities coincide; other times they do not."); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev. 315, 316–17 (1998) ("[C]urrent battles about judicial independence . . . threaten the role of law in American society and hence this society's fundamental aspirations."); Hon. Sandra Day O'Connor, *Judicial Independence and 21st-Century Challenges*, 29 DEL. LAW. 8, 9 (2011) ("Th[e] revolutionary promise—that our government would be structurally restrained from the impulsive abuses of power that might otherwise occur—can only be fulfilled if the judicial power is kept distinct from the political branches.").

103. See *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)) ("The irreplaceable value of the power articulated by Mr. Chief Justice Marshall . . . lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory

clear that these truths about the countermajoritarian nature of the Court either necessitate or justify the divide between its press-friendly statements in judicial opinions and its relatively inhospitable treatment of the press institutionally and individually. There are at least three ways in which this “countermajoritarian” difference between the Court and other branches of government provide a less than satisfactory explanation for the media-access dichotomy.

First, as a practical matter, it might well be argued that the Justices’ unique independence makes close journalistic coverage of their proceedings “more justifiable, not less so,”¹⁰⁴ than coverage of other government institutions. As Tony Mauro has thoughtfully argued in the context of cameras, even if we assume that broadcast coverage might “distort the behavior of elected officials” who must work to please their constituents, it should have “little negative effect on contemplative, life-tenured [Justices] who insist they are apolitical.”¹⁰⁵ If the Justices of the Supreme Court are, in fact, constitutionally different, their unique independence should render them “uniquely inattentive to the presence of cameras”¹⁰⁶ and to media coverage in general. Given this structural difference, we might expect that greater access by the press would be welcomed as a public education tool rather than feared as an encroachment on judicial independence.

Second, the suggestion that the other branches of government are accountable to an electorate while the judiciary is not does not necessarily support exceptionalism on the question of accommodating the press in its coverage of the Supreme Court. The understanding that the other branches of government are accountable must be paired with an understanding of the role the Supreme Court plays in keeping them accountable.¹⁰⁷ The electorate does not stop caring about the elected branches’ decisions and actions once they have been taken. Critically important to the voting public’s calculation of how satisfactorily these

government action. It is this role . . . that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.”); *Weiss v. United States*, 510 U.S. 163, 179 (1994) (“[J]udicial independence . . . helps to ensure judicial impartiality.”).

104. Mauro, *supra* note 2, at 271.

105. *Id.*

106. *Id.*

107. See THE FEDERALIST NO. 78, *supra* note 97, at 395 (“[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”).

officials are serving is whether those selected to perform these duties are behaving constitutionally—a determination that happens at the Supreme Court.¹⁰⁸ To the extent that voters value legislators who behave constitutionally, a full understanding of what happens at the U.S. Supreme Court—inevitably provided through the media that cover the Court—can help those voters make an informed decision in the voting booth. Thus, insofar as the nation's voters want constitutionally behaving legislators and executive branch officials, access to and understanding of U.S. Supreme Court decisionmaking is beneficial and necessary.

Third, even accepting the argument that the judiciary is different from the other branches for countermajoritarian reasons, this argument does not explain the gap between Supreme Court case law regarding the media and Supreme Court behavior toward the media, because at least some of that case law—indeed, the cases giving rise to the most forceful statements on the need for openness to the full public and the importance of the role of the press as surrogates to all those who would view their government in action—are cases involving press access to the *judiciary*, albeit courts other than the Supreme Court.¹⁰⁹ When the Court has touted the core First Amendment purposes of “assuring freedom of communication on matters relating to the functioning of government,”¹¹⁰ it has done so in the context of cases involving access to the work of the judiciary. When it has called for openness as a tool for combatting “ignorance and distrust . . . and suspicion concerning the competence” of government officials,¹¹¹ it has been speaking to officials in the judicial branch. And when it has spoken of media coverage as “enhanc[ing] the

108. *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 7 (2005) (statement of Patrick J. Leahy, U.S. Sen.) (“The Supreme Court is often the final arbiter of constitutional questions having a profound effect on all Americans. . . . [Greater public access] can deepen the understanding of the work of the courts, but it can also deepen our understanding that it is our rights that are there being protected.”). Breyer, *supra* note 1, at 1085 (“A free press is necessary to narrate to the public what is being done by those in power, to provide them in a more general way with the information necessary to vote and to make other political decisions in an intelligent way.”).

109. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (“[T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark.”); *id.* at 572 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”); *In re Oliver*, 333 U.S. 257, 271 (1948) (“[I]n comparison of publicity, all other checks [on trial judges] are of small account.”); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.”).

110. *Richmond Newspapers*, 448 U.S. at 575.

111. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (Brennan, J., concurring).

integrity and quality of what takes place,”¹¹² it has been referencing what takes place in courtrooms.

It might be argued that the U.S. Supreme Court is not only different from the other branches of government but different from the other components of its same branch of government,¹¹³ and that the line of reasoning that brings about constitutionally mandated access (and, more importantly, the sweeping press-praising language¹¹⁴) in cases involving criminal trials or preliminary hearing transcripts is inapt at the highest court in the land, where there is little history or tradition of accommodating the press.¹¹⁵ Yet as a functional matter, it is difficult to find a principled reason for differentiating lower courts from those that hear the appeals of the same cases. It might well be argued that the court with the greatest finality, which leaves litigants with no further avenue of relief and which interprets and declares law that will be binding for the entirety of the nation,¹¹⁶ should be the place where media access would bring the greatest benefits and where the greatest value would be served by openness and full coverage. In any event, any argument that it is a court that is functionally *less* important for purposes of flow of information to the public rings hollow.

112. *Richmond Newspapers*, 448 U.S. at 578.

113. The Supreme Court has held that the public and the press have a First Amendment right of access to court proceedings if those proceedings are traditionally open, and public access will play “a particularly significant positive role in the actual functioning of the process.” *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 10–311 (1986). Generally, criminal trials, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Richmond Newspapers*, 448 U.S. at 572, selection of jurors, *Press-Enterprise Co. v. Superior Court (“Press-Enterprise I”)*, 464 U.S. 501, 506 (1984), and preliminary hearings have been considered presumptively open. *Press-Enterprise II*, 478 U.S. at 10. The presumption can be overcome “only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise I*, 464 U.S. at 510.

114. The Supreme Court has not, of course, fully closed its proceedings or otherwise run afoul of the actual First Amendment doctrines of access. Rather, it appears to have developed media policies for its own operations that are inconsistent with the press-praising language that emerged from cases dealing with constitutional rights of access.

115. See MATHEWSON, *supra* note 76, at 10 (arguing that the Court has only made accommodations for the press “grudgingly” and “little by little” over the last century); Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1057 (1992) (arguing that despite the accessibility cases of the 1980s the Supreme Court remained incomprehensibly closed to broadcast media).

116. See generally *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (making the famous observation that “[w]e are not final because we are infallible, but we are infallible only because we are final”).

B. The Image Issue

Some of the arguments that have been put forth by Justices for exceptionalism on the question of press access—and particularly access by the broadcast media¹¹⁷—appear to rise and fall on questions of image preservation. Justices Kennedy and Breyer, for example, both have essentially contended that cameras in the U.S. Supreme Court are a bad idea because the Justices will be made to look biased, made to look foolish, or both.¹¹⁸ The Justices no doubt worry, in this era of YouTube and comedy news programs, that their sometimes funny, off-handed comments¹¹⁹ will become the target of national jokes.¹²⁰

Viewed generously, these image concerns are part and parcel of the countermajoritarian judicial independence argument discussed above.

117. For example, Justice Scalia has recently expressed his belief that the Justices will be misportrayed by snippets of broadcast footage in ways that are more harmful than the current potential for snippets of quotations in print publications. Kopan, *supra* note 97 (“People read that and they say ‘well that’s an article in the newspaper and the guy may be lying, or he may be misinformed.’ But somehow when you see it live . . . it has a much greater impact. I am sure it will mis-educate the American people[.]”)

118. See *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 34 (2011) (statement of Stephen Breyer, Assoc. J. of the United States Supreme Court) (“[Y]ou can make people look good or you can make them look bad, depending on what 30 seconds you take, and it is already cult and personality, and let us not make it worse.”); Anthony Kennedy, Interview Response, *The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices*, 25 BERKELEY J. INT’L LAW 71, 85 (2007) (“There are a number of people who want to make us part of the national entertainment network.”).

119. The blogosphere has had some fun with these comments over the years. In 2009 Justice Breyer made headlines when, during oral argument, he admitted that people placed things down his underwear in elementary school. Robert Barnes, *Supremely Funny: Study Covers Court’s Penchant for Laughter*, WASH. POST, Jan. 17, 2011, at A13. Justices Roberts and Kennedy received similar treatment in 2010 after asking how text messaging worked during oral arguments. Dahlia Lithwick & Graham Vyse, *Tweet Justice: Should Judges be Using Social Media?*, SLATE (Apr. 30, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html. In a 2011 speech Justice Ginsburg mentioned some of the funny comments made during the 2010 term, including a hypothetical about a 9,000-foot cow, an inquiry into the counsel’s thoughts on Satan, and a question about what James Madison thinks of video games. Ruth Bader Ginsburg, Assoc. J. of the United States Supreme Court, A survey of the 2010 Term, Presentation to the Otsego County Bar Association (July 22, 2011) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_07-22-11.html). She concluded by stating, “From the foregoing samples, you may better understand why the Court does not plan to permit televising oral arguments any time soon.” *Id.*

120. Tellingly, it appears that the only time any of the Justices have ever been the subject of a Saturday Night Live sketch has been during confirmation hearings, when they are in front of a camera for an extended period of time. Adam Burton, *Pay No Attention to the Men Behind The Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. REV. 53, 67 (2004).

The Justices want to be seen positively—to be viewed as competent, neutral, and legitimate arbiters of significant disputes—so as to preserve and maintain their important role in the constitutional scheme.¹²¹ Insofar as the assertions are made on these grounds, the weaknesses of claiming exceptionalism from the level of media access and accommodation that the Court's decisions declare as appropriate for its concomitant branches of government are discussed above.

To the extent that the concerns are not constitutionally grounded but instead are expressions of individual preferences not to be exposed to the downsides of media exposure, the Court's exceptionalism seems particularly unwarranted. It is inconsistent for Justices to intimate, time and again in judicial opinions, that the press can be trusted not to distort the news, and that the occasional distortion is just the cost of doing business in a democracy,¹²² and then to hold out the possibility of that distortion of news about the Court as a reason for cutting off access or refusing to accommodate reporters. The doctrinal principle set forth in the Court's case law suggests that more access should solve, rather than add to, distortion problems, as fuller information would be available to the people for consultation in making their judgments. It suggests that the counter for this potentially embarrassing or potentially erroneous speech should be more speech, not restrictions on the flow of information.¹²³

121. Breyer, *supra* note 118, at 86 (Responding to a question on cameras in the courtroom, Justice Breyer said, “[W]e see men and women of every race, every religion, every point of view, who have come into our court to resolve their differences . . . [a]nd we are trustees of that institution. And none of us, I think, wants to do anything to harm that institution.”); Luberd, *supra* note 4, at 519 (“The Supreme Court’s internal motivations when dealing with the media create a barrier that often inhibits media scrutiny. These goals include preserving public deference by restricting the media’s inquiry to opinions, downplaying individual differences among the Justices, and depicting the Court as being guided by precedent rather than personal agendas.”).

122. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (“Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government”); *Gertz v. Welch, Inc.*, 418 U.S. 323, 340–41 (1974) (“[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (“A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (“That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive.”) (citation omitted).

123. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (famously stating that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”); see also *U.S. v. Alvarez*, 132 S.Ct. 2537, 2550 (2012); *Texas v. Johnson*, 491 U.S. 397, 419–20 (1989); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982); *N.Y. Times Co.*, 376 U.S. at 270.

The Court is indeed unique as a governmental institution, in that its comparatively small size means nine Justices—the self-same people who are pressworthy—are able to make determinations about press access that serve their individual preferences, even if they do not serve the overarching democratic values asserted in the case law.¹²⁴ This practical motivation may be the truest explanation for the discrepancy between what the Court says in its opinions and what it does in its own policies. Substantial literature in the fields of psychology and communications makes clear that it is truly difficult to be the subject of news reporting, even of a positive variety—and that the consequences of fame, notoriety, and visibility are personally deep and psychologically broad.¹²⁵ Justice Byron White once openly admitted that the primary factor driving the Court's reclusiveness and his personal distaste for the press was that he "selfish[ly]" wanted his anonymity.¹²⁶ Others have argued that they will feel safer¹²⁷ if fewer Americans know about them and their work or see their faces on television,¹²⁸ a concern that is certainly worthy of

124. Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059, 1070–72 (1998) (explaining the methods by which the Supreme Court provides and denies access for news media).

125. See, e.g., Donna Rockwell & David C. Giles, *Being a Celebrity: A Phenomenology of Fame*, 40 J. PHENOMENOLOGICAL PSYCHOL. 178 (2009) (detailing numerous and varied negative psychological effects of fame); Mark Schaller, *The Psychological Consequences of Fame: Three Tests of the Self-Consciousness Hypothesis*, 65(2) J. PERSONALITY 291 (1997) ("[F]ame is stressful and unpleasant [and] might even be dangerous."); Mary Loftus, *The Other Side of Fame*, PSYCHOL. TODAY, May 1, 1995, at 48 (detailing the top stressors of public figures including lack of privacy, constant monitoring, and lack of security). These difficulties are heightened in today's media culture where "reverence and restraint are passé," and where "[t]he private lives of public figures are flaunted as never before, satisfying a public that seems to want to know everything about its celebrities." Burton, *supra* note 120, at 64–65.

126. Mauro, *supra* note 2, at 266 (quoting Justice White: "I am very pleased to be able to walk around, and very, very seldom am I recognized . . . It's very selfish, I know.")

127. Security concerns pose an interesting dilemma. In recent years, several federal judges have been physically attacked or harmed, and Justices of the Court have been among them. Most recently, Justice Breyer was robbed two times in 2012, one of which was at machete point in his vacation home in the Caribbean. *Ongoing Case of Burglar v. Breyer*, WASH. POST, May 18, 2012, at C02. Justices Souter and Ginsburg also have received death threats, and most prominently, Justice White was attacked while giving a speech in Utah in 1982. Matthew Chayes, *Courtroom Camera Bill Stirs Debate*, CHI. TRIB., Apr. 30, 2006, at C7.

128. Justice Thomas has argued that the presence of cameras in the courtroom present greater security risks. *Departments of Transportation, Treasury, HUD, the Judiciary, District of Columbia, and Independent Agencies Appropriations for 2007: Hearing before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 225–26 (2006) (statement of Clarence Thomas, Assoc. J. of the United States Supreme Court) ("I also think [cameras] will raise additional security concerns as the other members of the Court who now have some degree of anonymity, lose that anonymity. I

discussion.¹²⁹ Importantly, however, nothing in the case law indicates that privacy or seclusion preferences on the part of major governmental decision makers trumps press freedom or the desirability of media access, and the case law does not suggest that any aspect of the Court's work distinguishes the judiciary significantly from the other governmental decision makers on this front.¹³⁰

On the question of press coverage of the Justices' out-of-court remarks, speeches, and life choices, this same self-preservation instinct may likewise be driving much of the approach. The Justices wish to say something interesting in their speeches, but they do not want to reflect a bias that will be seen as prejudging a case or requiring recusal.¹³¹

probably have more of a public recognition than any of the current members of the Court, and that loss of anonymity raises your security issues considerably."). Security concerns have been a stated reason for a lack of progress on legislation before Congress that would mandate the use of cameras in oral arguments. Peabody, *supra* note 101, at 146.

129. Physical safety of jurists is plainly an important concern. It is worth noting, however, that security concerns have not stopped Justices from appearing on television when they have been promoting books or otherwise have chosen to participate in televised programs. Jodi Kantor, *Justices Sit on Highest Court, but Still Live Without Top Security*, N.Y. TIMES, Feb. 9, 2012, at A16 ("[T]he justices are not the remote figures of the past. Today, they give frequent speeches at law schools and bar associations, and they have appeared widely on television, from C-Span to a cameo this month by Justice Sonia Sotomayor on 'Sesame Street.' Such appearances undercut the case against televised proceedings . . ."); see also *The Supreme Court Club*, *supra* note 49, at A22 ("We are all for protecting justices, but some loss of privacy goes with the territory, and the justices are hardly anonymous. They have been turning up with increasing frequency on television on their own time."). There is also no clear proof that the presence of cameras or other increases in Court coverage and Justice recognition would actually create a greater security threat, as it is at least arguable that the Justices would be safer from random acts of violence if they were widely recognized as members of the highest Court in the land. See Jodi Kantor, *supra* at A16 (noting that only one of the attacks on a Justice in the last fifty years, the attack on White, was connected with his role as a Justice). Even if the presence of cameras in oral arguments might necessitate greater security protection for the Justices, that greater protection may already be long overdue. Unless Justices are traveling on business as Justices, they have little or no security protection. *Id.* When Justice Breyer was robbed in the Caribbean, the intruders walked right through the front door. *Id.*

130. See *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838–39 (1978) (quoting *Bridges v. California*, 314 U.S. 252, 89 (1941)) ("Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives '[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.'")

131. See Felix Frankfurter, *Personal Ambitions of Judges: Should a Judge "Think Beyond the Judicial"?*, 34 A.B.A. J. 656, 658 (1948) ("I am sure you can think of all the subjects that occur to my mind as to which, if I could not satisfy you, I might at least interest you. But here I am, suffering from what might be called judicial lockjaw."); Hugo L. Black, Assoc. J of the United States Supreme Court, Address at the Missouri Bar Annual Banquet (Sept. 25, 1942) (transcript available at <http://oldsite.mobar.org/e2781f08-6a9d-4e87-b33f-c18d20df3250.aspx>) ("The very fact that the entire range of human problems may come before a Justice in his official capacity imposes a sharp limitation on his freedom of discussion in his unofficial capacity."). Justice Scalia has been known to

Perhaps, as discussed above, they think they are different from other public officials because their neutrality is so critical to what they do. Perhaps they also believe that a small, sophisticated legal audience will be better able to recognize that interesting commentary in a speech is not necessarily a prospective announcement setting forth how a Justice will decide a matter that comes before the Court, while a wider media-fed audience will necessarily be less savvy, more judgmental, less carefully informed, or more likely to find an appearance of impropriety.

Again, if the preference to exclude the media reflects a desire not to be caught speaking inappropriately about cases that might come before them, it is manifestly an illegitimate argument. But to the extent that it reflects a conviction that the press will *inevitably* misunderstand, mislead, or misinform,¹³² it is perhaps the very best example of the real depth of the divide between the Supreme Court Justices' jurisprudential depiction of the media and their real-world depictions of it. There is no clear reason why the very same press that is portrayed as almost heroically trustworthy in judicial opinions should be portrayed as exceptionally untrustworthy when access to the Court and the Justices are at stake.

V. CONCLUSION

All told, there is undoubtedly some schizophrenia in the United State Supreme Court's on- and off-the-bench attitudes about the media and the necessity of press access. To date, discussions of the Court's limited policies on media coverage have failed to carefully consider the nuanced combinations of explanations for this disconnect—or to parse the constitutional, structural, and psychological elements of these divides. This Article begins the dialogue on the question by exploring both (1) the inconsistencies between the Court's case law on the media and its treatment of the media under its own policies and (2) the potential justifications for this disparity. Because many aspects of the constitutional and structural justifications for the dichotomy break down under close analysis, and because individual preferences and personal distrust of the press are likewise flawed grounds for distinguishing the

say candid and blunt things in his speeches, see *Journalists on the Workings of the Supreme Court*, *supra* note 2, but these speeches have led to demands for him to recuse himself from future cases. Leslie B. Dubeck, *Understanding "Judicial Lockjaw": The Debate over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 571 (2007).

132. Heilprin, *supra* note 96, at A19 (quoting Justice Scalia as saying, "The press is never going to report judicial opinions accurately").

Court from other governmental subjects of media coverage, the Justices may wish to reconsider aspects of their individual or collective press policies that hinder the journalistic endeavor.

